Supreme Court, U. S.
FILED
OCT 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-463

CHESTNUTT MANAGEMENT CORPORATION,

Petitioner,

v.

ELEANOR C. MILLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENTAL APPENDIX

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October 15, 1979

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Introduction—Intervening Matter

Rule 24(5) of this Court requires us to refer to actions by this Court during the year this petition has been pending.

Probable jurisdiction noted October 1, 1979 in *Consolidated Edison, etc.* v. *Public Service Commission of*

New York (No. 79-134) is even more important than decisions* on "implication" and "securities laws".

We also refer to reargument had October 2, 1979 in *Transamerica Mortgage Investors, Inc.* v. *Lewis* (No. 77-1645) embracing our Question "2" (Pet. p. 4).

The writ in *Transamerica* was granted a few days after petitioner Chestnutt filed its Reply Brief in Support of Petition. *Transamerica* will be decided on the face of the complaint. Accordingly, we print the complaint and answer as a Supplementary Appendix (A31 to A42 bound with this Supplemental Brief) to our petition for writ of certiorari. Pp. A1-A30 are bound with the Petition.

Con Edison, supra, is classic prior restraint.

This *Chestnutt* case is classic punishment for opinion published to the world. It was pleaded, tried, charged to the jury, and affirmed on appeal as unorthodox opinion.

This *Chestnutt* case is so far as we know the first ever to award money damage under the theory of a judicially created private right of action under the Investment Advisers Act.**

This Supplemental Brief focuses first on free speech and press and then the holding in *Redington*:

> "*Given* the fact that our task is to discern the intent of Congress when it enacted §17(a) in 1934 . . ." (slip 14, note 16, emphasis added).

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* We include reference to:

Touche Ross & Co. v. *Redington. Trustee, et al.* (No. 78-309) —— U.S. ——, 99 S.Ct. 2479 (1979).

Burks v. *Lasker* (No. 77-1724) —— U.S. ——, 99 S.Ct. 1831 (1979).

Cannon v. *Univ. of Chicago* (No. 77-926) —— U.S. ——, 99 S.Ct. 1946 (1979).

Teamsters v. *Daniel* (No. 77-753) —— U.S. ——, 99 S.Ct. 790 (1979).

** 15 U.S.C. 80b *et seq.*

The pleadings* show that respondent could not redraft her complaint to circumvent the First Amendment, since publication of opinion is the gist and essence.

In short, this suit never was, and never can be, either federal fish or state fowl.

Probable jurisdiction in *Con Edison, supra,* of blatant censorship under state law of another regulated industry, serves to emphasize the importance of granting the writ herein.**

In *Con Edison* state bureaucrats chopped a few cables to prevent dissemination of what state bureaucrats conjectured other people might dislike, be infected by, or be influenced by.

In this *Chestnutt* case, a federal regulatory statute has been twisted to require a jury to determine the orthodoxy of a twenty-year old book and letters published to the world by a "maverick" who is in the business of publishing financial opinion, and to impose punitive damage for unorthodox opinions, even though no fact was challenged or omission of fact claimed.

Appellant *Con Edison* has been gagged on "controversial matters". Petitioner *Chestnutt* has been punished for a philosophy of "contrary opinion", which turned out to be exactly right, since hard upon respondent's panic liquidation in April 1970 stock prices marched to all time highs by January 1973.

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* As pointed out in our Petition (p. 14), the charge to the jury in October 1975 preceded by several months this Court's decision in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976).

** The SEC's *Amicus Curiae* Brief (February 1979) in Trans*america,* pp. 32-33, gives the Commission's estimate of $200 billion under advisement by registered advisers, hardly an invitation to gag or punish financial opinion free speech in an industry perhaps as large as utilities.

ARGUMENT

I.

In Anno Domini 1940—What Congress Knew Then.

In that year the half a thousand Members of the two Houses of Congress included many lawyers.

A. *Free Speech and Press in 1940*

By 1938 this Court had held that the First and Fourteenth Amendments' protection of free speech and press "comprehends every sort of publication which affords a vehicle of information and opinion". *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938). Applicability of these Amendments to the States and their laws had been held in *Gitlow* v. *New York,* 268 U.S. 652 (1925), and the protection of corporations under the Amendments had been recognized in *Grosjean* v. *American Press Co.,* 297 U.S. 233, 244 (1936).

Thus, the 1940 Congress already knew that the Advisers Act *could not be intended* to censor opinion or punish its publication, even though the "free flow of commercial information" had not yet been protected nor the "highly paternalistic" approach rejected, *Virginia State Board of Pharmacy* v. *Virginia Citizen Consumers Council, Inc.,* 425 U.S. 748, 764, 770 (1976). As we say in our petition (p. 16), in *First National Bank etc.* v. *Bellotti,* 435 U.S. 765 (1978), this Court completed the "interweaving of public policy free speech and commercial free speech, irrespective of the speaker". See also *Carey* v. *Population Service International,* 431 U.S. 678 (1977).

In 1940 half a thousand Congressmen cannot be presumed to have forgotten that *Ex Parte Jackson,* 96 U.S. 727 (1878), prohibited Congress from punishing the Senior

Editor of *Medical Economics* for describing petitioner Chestnutt as a "maverick" in a ten-column article (Exh. 4 in evidence) printed in that professional journal and sending it through the mails, nor could Congress have prohibited petitioner Chestnutt from mailing reprints (with permission), or punished him for doing so. Petition, *passim,* Exhibit 4, printed Petition appendix A1-A7.

B. *The Federal Rules in 1940*

The requirement of Rule 9(b), Fed.R.Civ.Pr., that ". . . the circumstances constituting fraud or mistake shall be stated with particularity", according to Professor Moore* were "well established at common law", citing and quoting as authority *Southern Dev. Co.* v. *Silva,* 125 U.S. 247, 250 (1888):

> "*First,* that the defendant has made a representation in regard to a material *fact; Second,* that such representation is false; *Third,* that such representation was not actually believed by the defendant, on reasonable grounds, to be true; *Fourth,* that it was made with intent that it should be acted on; *Fifth,* that it was acted on by complainant to his damage; and *Sixth,* that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

Five decades after that decision and two years after effectiveness of the Federal Rules, Congress in §206(4) of the Advisers Act prohibited "fraudulent, deceptive or manipulative" acts, practices or course of dealing. The Advisers Act did not amend Rule 9(b).

Publication of opinion is not a "public wrong" giving rise to "private action". See Thayer, *Public Wrong and*

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*2A Moore's Federal Practice ¶9.03.

Private Action, 27 Harv.L.Rev. 317 (1914). *Ubi jus ibi remedium* cannot punish exercise of constitutional right.

The national law school of Ames, Langdell and Thayer, while examining "the better view, Massachusetts to the contrary", nevertheless produced as well the Brandeis of *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64, 79 (1938):

> "The fallacy underlying the rule declared in Swift v. Tyson is made clear by Mr. Justice Holmes.[23] The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law' ". (Footnote omitted)

The complaint herein is a gaggle of migratory bootstraps, since there is not even the identification of any "material *fact*" misstated or omitted, nor identification of any security, nor identification of any transaction or course of dealing which was "fraudulent, deceptive or manipulative".

Since, however, ¶ 1 of the complaint (A31) sandwiches the statute between "diversity"* and "pendent jurisdiction", respondent had the burden to show that the Nutmeg State had some "better view" of *substantive* law than that required by the Advisers Act and Rule 9(b), Fed.R.Civ.Pr.

This she failed utterly to do, as evidenced not only upon the face of the complaint, but evidenced as well through the panel's nomination of wholly stranger jurisdictions, in lieu of any hypothetically different Connecticut "law". As to any eclecticism of substantive law, we juxtapose and

* Respondent alleges citizenship of the Granite State.

repeat from our Reply Brief in support of petition (p. 8, fn.):

> "Since Chestnutt did not peddle real estate or sell anything to, or buy anything from respondent, it is understandable that respondent does not adopt Judge Timbers' invocation (A25) of Pennsylvania backed up sewage (*Shore* v. *Hoffman,* 227 Pa.Super. 176, 324 A.2d 532 (1974)), District of Columbia real property surveys (*Isen* v. *Calvert Corp.,* 379 F.2d 126 (C.A.D.C. 1967)), title to whiskey in Salt Lake City (*Stein* v. *Treger,* 182 F.2d 696 (C.A.D.C., 1950)) or defense on a note for purchase of Kentucky bank stock (*Anderson* v. *Tway,* 143 F.2d 95 (6 Cir. 1944))."

While this Court does not sit to "decide" questions of state law (*Burks, supra,* slip 14), where contrary to *Erie* there has been the "assumption" of a "transcendental body of law outside of any State" (or any jurisdictional eclecticism), it is plain that no conceivable "diversity" or "pendent" case exists, and that after seven and a half years no amendment of the complaint could allege any federal or common law claim under the Federal Rules.

C. *The 1940 Intent of Congress in the Advisers Act*

In 1940 the Federal Rules and the fame of *Erie,* including the "fallacy" of "a transcendental body of law", were two years old, and Congress knew it.

In 1940 Congress did not know that in 1946 a district court would find a "transcendental body" of "basic principles of tort law" to create a private cause of action under a statute enacted in 1934. *Kardon* v. *U.S. Gypsum* (E.D. Pa., 1946), 69 F.Supp. 512, 514. Contrast *Redington,* slip 7.

In 1940 Congress did not know that its express grant in 1947 of *substantive* jurisdiction in Taft-Hartley over "suits for *violation* of [labor] contracts" (emphasis added) would in 1961 incite an "Indication of Congressional intent to create a body of federal law giving rise to a distinctive federal claim . . ." under the different Investment Company Act of 1940.* *Brown* v. *Bullock* (2 Cir., 1961), 294 F.2d 415, 421. Contrast *Burks,* slip 5, "It is true that in certain areas we have held that federal statutes authorize the federal courts to fashion a complete body of federal law. See *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 451, 456-457 (1957). Corporation law, however, is not such an area."

In 1940 Congress did not know that in 1964 it would be held for the first time that creation of a private cause of action had already for three decades been a "necessary supplement to Commission action" to enforce a regulatory statute of 1934. *J. I. Case* v. *Borak,* 377 U.S. 426, 432 (1964).

The words in *Redington*: "Given the fact that our task is to discern the intent of Congress when it enacted §17(a) in 1934 . . .", show, we submit, that nothing but the *intent* of Congress in 1940 has any "relevance" (slip 14, note 16).

Transamerica's briefs, including its Supplemental Brief on reargument, and the *Amicus Curiae* brief of Investment Counsel Association of America, Inc. in *Transamerica* show definitively that Congress intended *not* to create any private right of action.

What Congress both did, and intended to do, in 1940 was to require investment advisers to register in order that both disclosure and regulation should be effective.

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* 15 U.S.C. 80a, *et seq.*

The SEC's *Amicus Curiae* brief (February 1979) in *Transamerica,* at page 35, lists the numerous sections of the Advisers Act both as to (1) disclosure and (2) regulation.

Under the statutory scheme and the Commission's broad rule-making authority, for which the SEC's brief cites no less than seven sections of the Advisers Act in a footnote on page 35, petitioner has since 1952 filed Chestnutt's book and its Seventeen Annual Editions (Ex. 5 in evidence), plus decades of weekly opinion letters accompanying unchallenged facts (Ex. 3 in evidence).

The SEC has never sought administrative sanctions or an injunction concerning Chestnutt's publications.

II.

The Crux of This Case Is the First Amendment.

Con Edison's appeal is classic prior restraint.

This *Chestnutt* case is classic punishment for published opinion, where petitioner has been deprived even of the defense of truth of every fact stated.

Whatever arguable avenues of time, place and manner of communication remain open to *Con Edison,* no avenue whatever is open to petitioner *Chestnutt.*

It was the idea itself which created punitive damage.

Respondent elected the federal court, assuming an impenetrable dark rain forest of "securities laws" and "implication". The searchlights of recent decisions of this Court blazingly illuminate that her suit is amorphous in all respects, except that the clear shape of the First Amendment was targeted to the jury which hit its exercise with punitive damage.

Since there can be no "intent" imputed to Congress in enacting the statute in 1940 to violate petitioner's free speech rights, the surest judicial restraint is quick jealousy to protect the full territory of the First Amendment from invasion by imputing such unwarranted "intent" to Congress.

Every consideration recognizing jurisdiction in *Con Edison* should lead to granting the writ herein.

CONCLUSION

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

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October 15, 1979

SUPPLEMENTAL APPENDIX

TO PETITION

FOR WRIT OF CERTIORARI

(Pages A31 through A42, Being the Complaint and Answer)

[Appendix Pages A1 through A30 Are Printed and Bound With the Petition Filed September 18, 1978]

Complaint

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. B-447

ELEANOR C. MILLER,

Plaintiff,

vs.

CHESTNUTT MANAGEMENT CORPORATION, and CHESTNUTT CORPORATION,

Defendants.

As and for a First Cause of Action:

1. (a) Jurisdiction of this Court is based upon 28 U.S.C. §1332, in that plaintiff is a citizen of the State of Vermont and defendants are corporations organized and existing under the laws of the State of Connecticut, having their principal places of business in Connecticut. The matter in controversy exceeds the sum of ten thousand dollars ($10,000.00), exclusive of costs and interest.

(b) Furthermore, jurisdiction of this Court is based upon Section 214 and Section 215 of the Investment Advisers Act of 1940 [15 U.S.C. §§80(B)(14) & (15)].

(c) Still furthermore, jurisdiction of this Court is based upon the principle of pendent jurisdiction.

2. On information and belief, defendants at all times material in this complaint were Connecticut corporations having places of business in Greenwich, Connecticut, doing

business under their corporate names. Chestnutt Management Corporation represented itself as the "Investment Counseling Subsidiary of Chestnutt Corporation". During the period involved herein, Chestnutt Corporation was the manager-adviser of American Investors Fund, Inc. (a mutual fund), and was the corporation which printed weekly "Stock Market Survey" reports, distributed to, among others, plaintiff and, on information and belief, to other investment advisory accounts. As the said corporations acted in concert, plaintiff has brought this action collectively against Chestnutt Management Corporation and Chestnutt Corporation.

3. At all times material in this complaint, plaintiff acted through her agent, Dudley E. Miller, her husband, who was, at all times, duly authorized and empowered to act on her behalf. Said Dudley E. Miller was accepted to so act in this capacity by defendants.

4. The business in which defendants were engaged at all times material in this complaint was that of "investment advisers" and/or "investment counsel". On information and belief defendants were registered as such under the Investment Advisers Act of 1940.

5. At all times material in this complaint, defendants held themselves out to the public to be competent investment advisers and/or investment counsel, and, as such, had fiduciary duty in the management of any client's securities and other investments.

6. On or about February 16, 1969, plaintiff entered into a contract with defendants, or one of them, in that she hired and engaged defendants, or one of them, to render

to her investment supervisory services in connection with an account containing certain funds and securities owned by plaintiff.

7. Said account is specifically identified as Account Number 60-609477-6, which on said date was a margin account with the brokerage firm of Spencer, Trask & Company, with offices at 60 Broad Street, New York, New York.

8. In connection with the hiring and engagement of defendants as aforesaid in paragraph 6 hereof, plaintiff delivered to defendant Chestnutt Management Corporation a power of attorney addressed to said Spencer, Trask & Company, authorizing Chestnutt Management Corporation to act as the plaintiff's agent and attorney-in-fact in order to buy, sell (including "short sales") and to trade, on margin or otherwise, for her account in stocks and bonds and any other securities.

9. The aforesaid account at Spencer, Trask & Company, at the time of the hiring and engagement of defendants, or one of them, had a value of about One-hundred thirty-one thousand three-hundred five dollars ($131,305).

10. In accordance with said hiring and engagement, defendants, or one of them, from February 16, 1969, to April 24, 1970, when their services were terminated, bought, sold and otherwise traded securities on behalf of and for plaintiff. For said services, defendants, or one of them, were paid an agreed compensation.

11. At the time of the termination of defendants' services as investment advisers and/or investment counsel, said account had a value of about Fifty-six thousand five-hundred one dollars ($56,501).

12. Plaintiff was induced to hire, engage and contract with defendants, or one of them, for the aforementioned investment supervisory services and/or advice on account of the fraudulent, deceptive and manipulative acts and practices of defendants, in that defendants, or one of them, published, circulated and distributed advertisements:

(a) Where referred, directly or indirectly, to a testimonial concerning services rendered by defendants;

(b) Which represented, directly or indirectly, that certain graphs, charts, formulae and other devices could in and of themselves be used to determine which securities to buy or sell, or when to buy or sell them; and

(c) Which represented that certain graphs, charts, formulae and devices would assist plaintiff in making decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in said advertisements the limitations of said graphs, charts, formulae and devices, and the difficulties with respect to their use.

13. The publication, circulation and distribution of said advertisements made use of the mails and were in violation of Section 206 of the Investment Advisers Act of 1940 and the rules and regulations promulgated thereunder.

14. As a result of the aforesaid fraudulent, deceptive and manipulative acts and practices of defendants, plaintiff was damaged in the amount of Seventy-four thousand eight-hundred four dollars ($74,804).

As and for a Second Cause of Action:

15.-27. Plaintiff repeats and realleges each and every allegation in paragraphs 1 through 13 of the First Cause

of Action as if they were fully set forth herein and numbers them for this Second Cause of Action paragraphs 15 through 27.

28. On various and divers occasions from February 16, 1969 to April 24, 1970, defendants, or one of them, made to plaintiff through their various publications several statements which were false and misleading about the state of the securities market in the United States and which, on information and belief, were known to defendants to be false and misleading, or, in the alternative, should have been known to defendants to be false and misleading.

29. During the aforesaid period, plaintiff and her husband were absent from the continental and territorial United States, being in Africa and Europe, and traveling to different areas between and therein, because the employment of her husband necessitated such.

30. Defendants knew that plaintiff was abroad and traveling for such period.

31. Because plaintiff was abroad and was frequently traveling, as defendants know or should have known, plaintiff relied almost entirely on defendants' management of her account and the investment advice contained and set forth in the publications to which reference is made in paragraph 26 hereof.

32. As a result of her reliance on said false and misleading statements, plaintiff was damaged in the amount of Seventy-four thousand eight-hundred four dollars ($74,804).

Complaint

As and for a Third Cause of Action:

33.-49. Plaintiff repeats and realleges each and every allegation of paragraphs 15 through 31 of the Second Cause of Action as if they were fully set forth herein and numbers them for this Third Cause of Action paragraphs 33 through 49.

50. From February 16, 1969, to April 24, 1970, defendants bought, sold and otherwise traded various securities on behalf of plaintiff in a negligent and reckless manner, in disregard of their fiduciary duties to plaintiff in one or more of the following respects:

(a) Defendants failed to liquidate certain securities which should have been liquidated;

(b) Defendants failed to maintain a reasonable "cash" or "liquid" position during an uncertain economic period;

(c) Defendants bought, sold and traded securities in plaintiff's account in an inordinate number of transactions —actually "leapfrogging" from stock to stock—in disregard of attendant market conditions and, by doing so, caused plaintiff to suffer losses;

(d) Defendants failed to "sell short" when market conditions necessarily dictated that such be done; and

(e) Defendants failed to follow their own injunction: "Don't overdiversify", with respect to the management of plaintiff's account.

51. As a result of the aforesaid negligence of defendants, plaintiff was damaged in the amount of Seventy-four thousand eight-hundred four dollars ($74,804).

Complaint

As and For a Fourth Cause of Action:

52.-62. Plaintiff repeats and realleges each and every allegation of paragraphs 1 through 11 of the First Cause of Action as if they were fully set forth herein and numbers them for this Fourth Cause of Action paragraphs 52 through 62.

63. In large part, plaintiff was induced to hire and engage and enter into her contract with defendants as set forth in paragraphs 52 through 62 herein by the representation of the defendants that they would "sell short" from time to time as market conditions dictated.

64. Market conditions, on many occasions during the period February 16, 1969, to April 24, 1970, dictated the employment of the "short sale". Defendants, recklessly and with apparent disregard for the financial interests of plaintiff, failed to "sell short" for plaintiff's account.

65. As a result of the aforesaid misrepresentation of defendants, plaintiff was damaged in the amount of Seventy-four thousand eight-hundred four dollars ($74,804).

WHEREFORE, plaintiff prays:

(1) That the Court adjudge, decree and declare that the aforesaid contract entered into by the parties is void *ab initio*, in that defendants, or one of them, violated Section 206 of the Investment Advisers Act of 1940 and the regulations promulgated thereunder;

(2) For a judgment rescinding the aforesaid contract;

(3) For a judgment against defendants, or one of them, in the amount of Seventy-four thousand eight-hundred four dollars ($74,804);

Complaint

(4) For a judgment awarding plaintiff interest at the legal rate from February 16, 1969, and costs of this action, including a reasonable allowance on account of attorney's fees and disbursements; and

(5) Such other and further relief as in justice and equity may appertain and which the Court deems proper.

Dated at Stamford, Connecticut this 4th day of February, 1972.

/s/ Peter M. Ryan
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Answer of Defendants

UNITED STATES DISTRICT COURT

District of Connecticut

Civil Action No. B-447

Eleanor C. Miller,

Plaintiff,

vs.

Chestnutt Management Corporation,
and Chestnutt Corporation,

Defendants.

RECEIVED FEB 22 1972

Answer of Defendants
Chestnutt Management Corporation
and
Chestnutt Corporation

Defendants Chestnutt Management Corporation and Chestnutt Corporation, by their attorney, Stanley L. Sabel, answering the complaint of the Plaintiff herein, on information and belief, respectfully show to this court and allege with respect to each numbered paragraph of the Complaint, as follows:

As to the Alleged First Cause of Action:

1. (a) Deny knowledge or information sufficient to form a belief, except to admit that defendants are corporations organized and existing under the laws of the State of Connecticut, and have their principal places of business in Connecticut.

(b) Deny.

(c) Deny.

2. Deny that defendant corporations acted in concert, but admit other allegations.

3. Admit.

4. Admit that defendant Chestnutt Corporation was and is engaged in business as an "investment adviser" and that defendant Chestnutt Management Corporation was and is in business as an "investment counsellor."

5. Deny.

6. Deny as to defendant Chestnutt Corporation; admit as to defendant Chestnutt Management Corporation.

7. Admit, except to assert that the correct Account Number was 60-609447-6.

8. Admit.

9. Deny, except to the extent that market quotations for securities held in Plaintiff's portfolio aggregated approximately $131,305 as of February 28, 1969.

10. Deny as to defendant Chestnutt Corporation; admit as to defendant Chestnutt Management Corporation.

11. Deny, except to admit that $56,501 constituted the approximate credit balance after sale of all securities pursuant to Plaintiff's instructions on or about April 24, 1970.

12. Deny.

13. Deny.

14. Deny.

As to the Alleged Second Cause of Action:

15-27 Defendants repeat each and every denial, allegation and admission with respect to paragraphs 1-13 of the Answer to the Alleged First Cause of Action as if they were fully set forth herein and numbers them for this Answer to the Alleged Second Cause of Action paragraphs 15 through 27.

28. Deny.

29. Deny knowledge or information sufficient to form a belief.

30. Deny.

31. Deny.

32. Deny.

As to the Alleged Third Cause of Action:

33-49 Defendants repeat each and every denial, allegation and admission with respect to paragraphs 15-31 of the Answer to the Alleged Second Cause of Action as if they were fully set forth herein and numbers them for this Answer to the Alleged Third Cause of Action paragraphs 33-49.

50. Deny.

Answer of Defendants

51. Deny.

As to the Alleged Fourth Cause of Action:

52-62 Defendants repeat each and every denial, allegattion and admission with respect to paragraphs 1-11 of the Answer to the Alleged First Cause of Action as if they were fully set forth herein and numbers them for this Answer to the Alleged Fourth Cause of Action paragraphs 52 through 62.

63. Deny.

64. Deny.

65. Deny.

AFFIRMATIVE DEFENSE

The complaint fails to state any claim upon which relief can be granted against either defendant Chestnutt Corporation or defendant Chestnutt Management Corporation.

WHEREFORE defendants Chestnutt Corporation and Chestnutt Management Corporation demand judgment dismissing the complaint herein, together with the costs and disbursements of this action.

/s/ STANLEY L. SABEL
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